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No. 86-684

Supreme Court, U.S.
E I L E D

JUL 31 1987

JOSEPH F. SPANIOL, JR.
CLERK

**In The
Supreme Court of the United States**

October Term, 1987

— o —
CALIFORNIA,

Petitioner,

v.

**BILLY GREENWOOD AND
DYANNE VAN HOUTEN,**

Respondents.

— o —
**ON WRIT OF CERTIORARI TO THE COURT
OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT**

— o —
BRIEF FOR PETITIONER
— o —

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QUESTION PRESENTED

**DO WARRANTLESS TRASH SEARCHES OF DIS-
CARDED GARBAGE VIOLATE THE FOURTH AND
FOURTEENTH AMENDMENTS?**

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, is published as *People vs. Billy Greenwood*, et al. [182 Cal.App.3d 729; 227 Cal.Rptr. 539 (1986).] A copy of this opinion appears in the appendix to the printed Petition for Certiorari at pages 9-15.

The Order of the California Supreme Court denying Petition for Review appears in the appendix to the printed Petition for Certiorari at page 16.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was filed June 23, 1986.

A timely Petition for Review was denied by the California Supreme Court on August 28, 1986.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. [*American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923).]

This petition, filed within 60 days of that date, is timely. This Court's jurisdiction is invoked under 28 USCA section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

“[N]or shall any State deprive any person of life, liberty or property, without due process of law . . .” U.S. CONST. amend XIV, Section 1.

“Right to Truth in Evidence.”

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceedings, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.” Cal. CONST. art. I, section 28, subdivision (d).

California Penal Code Section 995:

[When indictment or information must be set aside]

(a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in this code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information :

(A) That before the filing thereof the defendant has not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause.

(b) In cases in which the procedure set out in subdivision (b) of Section 995a is utilized, the court shall reserve a final ruling on the motion until those procedures have been completed.

o

STATEMENT OF THE CASE¹

Respondents were charged with felony narcotic offenses after contraband was twice discovered in Greenwood's home during the execution of two different search warrants in 1984. Both warrant affidavits included incriminating information obtained from warrantless searches and seizures of trash Greenwood left for collection at the curb. While the preliminary hearing magistrate upheld each warrant, the superior court disagreed and granted Greenwood's and Van Houten's motion to set aside the information, concluding their motion to suppress evidence seized pursuant to the warrants should have been granted at the preliminary hearing. (C.T. 261, J.A. 75)

The Court of Appeal affirmed the dismissal based on the 1971 decision of the California Supreme Court in *Peo-*

¹ The designation "J.A." refers to the Joint Appendix; "C.T." to the Clerk's Transcript; and "R.T." to the Reporter's Transcript.

ple vs. Krivda, 5 Cal.3d 357, which held that warrantless trash searches violate the Fourth Amendment. The California Supreme Court denied the People's Petition for Review. The Petition for Writ of Certiorari was granted.

Based on tips received by the Laguna Beach Police Department that respondent Greenwood was involved in drug trafficking, investigators conducted warrantless trash searches of Greenwood's garbage on April 6, 1984 and on May 4, 1984. Each time, at the investigator's request, the regular trash collector picked up the plastic garbage bags which the resident had placed outside the curtilage in the public street in front of the single family residence with a detached guest house. (J.A. 4-7)

The collector placed the bags in the bin of his truck and drove down the street where he turned the bags over to the police investigator who took the bags to the police department where the contents were examined. (J.A. 4-7)

Both times evidence of drug trafficking was uncovered which was used to obtain search warrants, each of which led to the seizure of drugs in the residence and the instant prosecution. The affidavits in support of the search warrants detailed the trash collection. (J.A. 32-33, 40-41)

The respondents moved to quash the search warrants in Municipal Court claiming the warrantless trash searches violated the Fourth Amendment. (J.A. 2-4) The magistrate denied their motion. (J.A. 4) An information charging the offenses was filed in the Superior Court. (J.A. 10) In the Superior Court, respondents moved to set aside the information claiming the warrantless trash searches violated the Fourth Amendment. (J.A. 15)

The People argued that *Krivda*, on which respondents relied, was an incorrect statement of federal law. (J.A. 53, 74)

The Superior Court, although expressing dissatisfaction with *Krivda*, granted respondents' motion to set aside the information on February 1, 1985, ordered the case dismissed, and ordered the respondents discharged. (J.A. 75; See also C.T. 261)

The Court of Appeal of the State of California, Fourth Appellate District, affirmed the dismissal on June 23, 1986:

"Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*." (App Pet for Cert. 14)

The California Supreme Court denied the People's Petition for Review on August 28, 1986. (App Pet for Cert. 16)



SUMMARY OF ARGUMENT

There is no Fourth Amendment violation in examination by police officers of the contents of trash bags an individual voluntarily places outside the curtilage in a public street for collection.

An individual has no subjective expectation of privacy in such discarded trash which has been knowingly ex-

posed to the public. Even if he has such an expectation, it is not reasonable.

The act of placing trash out for collection constitutes an abandonment of the trash to, at the very least, the trash collector, and constitutes an abandonment of an expectation of privacy to anyone who examines it, whether that person is the trashman, a neighbor, a scavenger or the police conducting a focused investigation.

Neither the trashman nor the police have a constitutional obligation to aid an individual in concealing his criminal activity by commingling his trash with that of other citizens before examining it. An individual who hopes this will occur assumes the risk that the person to whom he voluntarily entrusts his discarded trash may turn it over to the police, may be an agent of the police, or may be the police.

The unanimous view of the federal courts of appeal as well as the view of the majority of the state courts considering the issue support petitioner's position. An individual's trash placed outside the curtilage for collection or removed from the curtilage by the authorized collector is not protected from governmental examination by the Fourth Amendment.

ARGUMENT

AN INDIVIDUAL'S TRASH PLACED OUTSIDE THE CURTILAGE FOR COLLECTION OR REMOVED FROM THE CURTILAGE BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM POLICE EXAMINATION BY THE FOURTH AMENDMENT.

The Touchstone of the Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy" *Katz vs. United States*, 389 US 347, 360 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? (See *Smith vs. Maryland*, 442 US 735 (1979).)

Here respondent failed to manifest such a subjective intent. He neither maintained that which he wished to conceal in his residence, or within the curtilage. He neither burned nor shredded the items which became the basis for search warrants.

There is nothing unfair about requiring that people not discard things that they want to keep secret, or destroy them before they do. (*United States vs. Kramer*, 711 F.2d 789 (7th Cir.) cert.den. 464 U.S. 962 (1983).)

A hope of privacy is not equivalent to an expectation of privacy (*California vs. Ciraolo*, 476 US —, 90 L.Ed.2d

210 (1986); *California vs. Rooney*, 483 US —, — (1987) (White, J., dissenting).) Respondent knowingly exposed evidence of his drug activities by depositing it on a public street.

Even assuming respondents had an expectation of privacy, steps taken to protect privacy do not establish that expectations of privacy are legitimate (*Oliver vs. United States*, 466 US 170 (1984).) The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment (*Oliver*, supra at 182-183). It is common knowledge that discarded garbage bags are visited by animals, children and scavengers looking for items such as recyclable cans, clothing and household furnishings.

Any distinction between examination of trash by trash collectors or scavengers on the one hand and by the police on the other is untenable. If property is exposed to the general public, it is exposed in equal measure to the police. (*Calif. vs. Ciraolo* 476 US —, 90 LEd2d 210; *California vs. Rooney*, supra, (White, J., dissenting))

And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. (*United States vs. Jacobsen*, 466 US 109, 122, fnt 22 (1984))

It has been recognized in California that one has no reasonable expectation that discarded trash will remain secret from the trash collector. (*People vs. Gray*, 63 Cal. App.3d 282, 133 Cal.Rptr. 698 (1976))

It has also been appreciated that:

“Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one’s trash barrels and remove some of its contents.” (*Krivda*, supra, 5 Cal.3d at 367)

Although the Fourth Amendment only prescribes governmental action, the determination of a reasonable expectation of privacy isn’t made by viewing the individual’s subjective expectation of not being discovered by the police. Only if there is first a legitimate expectation of privacy does governmental intrusion implicate the Fourth Amendment. If an individual can’t reasonably assume that his discarded trash is immune to inspection by the trash collector, neighbors, scavengers or recyclable can enthusiasts, he cannot entertain a reasonable expectation of privacy in such refuse. Thus governmental examination does not intrude on his right to privacy.

Respondents’ trash was placed in the street for the purpose of conveying it to a third person, the trash collector, who picked it up. This court has repeatedly held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.

(*Smith vs. Maryland* 442 US at 743-744; *United States vs. Miller*, 425 US 435)

. . . the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Governmental authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. (*U.S. vs. Miller* 425 US at 443)

Most courts have concluded that trash placed for collection outside the curtilage or removed from the curtilage by the trash collector is abandoned property. (e.g. *United States vs. Dela Espirella* 781 F.2d 1432 (9th Cir. 1986))

The California Court has suggested that such trash is abandoned only as to the trash collector (*People vs. Edwards* 71 Cal.2d 1096, 1104; *People vs. Krivda* 5 Cal.3d 357, 366 and at 369 Wright, C.J., dis.)

The primary object of the Fourth Amendment is to protect privacy, not property, and the question isn't whether respondent abandoned his interest in the property sense but whether he retained a subjective expectation of privacy that society accepts as objectively reasonable. (*Rooney*, supra, White, J., dissenting) A person may well not intend to relinquish all rights in personal property but nevertheless take action rendering his intent ineffective for Fourth Amendment purposes. The act of placing garbage for collection is an act of abandonment.

The distinction California attempts to draw between abandonment to the trashman or to the public is not supportable under the Fourth Amendment. At bar it was in fact the trashman who picked up the trash and turned it over to the police. Thus seizure of the garbage bags from the trash collector was no meaningful interference with respondents' possessory interests in the property (*Jacobsen*, supra, 466 US at 113) Respondents' possession was relinquished with no expectation of ever possessing the refuse again.

The decision by the California Court of Appeal is at odds with 21 years of decisions by this Court which hold that an individual's misplaced confidence that a person to whom he voluntarily confides his wrongdoing will not reveal it is not protected by the Fourth Amendment. (*Hoffa vs. United States*, 385 US 293 (1966); *Lewis vs. United States*, 385 US 206 (1966); *United States vs. White*, 401 US 745 (1971); to the same effect see also *People vs. Phillips*, 41 Cal.3d 29 (1985))

Every federal circuit court of appeals considering the issue has concluded that warrantless trash searches do not violate the Fourth Amendment (*United States vs. Mustone* (1st Cir. 1972) 469 F.2d 970; *United States vs. Terry* (2nd Cir. 1981) 702 F.2d 299, cert.den. 461 US 931; *United States vs. Reichert* (3rd Cir. 1981) 647 F.2d 397; *United States vs. Crowell* (4th Cir. 1978) 586 F.2d 1020, cert.den. 440 U.S. 959; *United States vs. Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert.den. 606 U.S. 1081); *Magda vs. Benson* (6th Cir. 1976) 536 F.2d 111; *United States vs. Shelby* (7th Cir. 1978) 573 F.2d 971 (cert.den. 439 U.S. 841); *United States vs. Biondich* (8th Cir. 1981) 652 F.2d 743 (cert.den. 454 US 975); *United*

States vs. Dela Espirella (9th Cir. 1986) 781 F.2d 1432; *United States vs. O'Bryant* (11th Cir. 1985) 775 F.2d 1528.)

Recently in *Dela Espirella*, supra, the Ninth Circuit ruled on a warrantless trash search case from California:

As part of their investigation, federal agents searched trash containers placed for curbside collection outside Ronderos' home. The agents discovered various documents in the trash that were used to obtain a search warrant and were introduced into evidence at trial. Ronderos argues that the district court erred in not suppressing this evidence as obtained in violation of the fourth amendment.

We find this argument to be without merit. Warrantless searches of abandoned property do not violate the fourth amendment. The question, then becomes whether placing garbage for collection constitutes abandonment of the property. We join the other federal appellate circuits that have considered the matter and hold that it does. (781 F.2d at 1437.)

In *United States vs. Shelby*, supra, the court held: As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his trash since he contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendant did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.

It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974, cert.den. 439 U.S. 831.)

In *United States vs. Reicherter* (3rd Cir. 1981) 647 F.2d 397, the Court stated:

Defendant claims that under *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19b L.Ed.2d 576 (1967), he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors such that, when the police officers looked through the garbage and seized the methamphetamine, they violated the fourth amendment. A mere recitation of the contention carries with it its own refutation.

. . .

Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable. (647 F.2d at 399)

The majority of state courts considering the issue have likewise concluded that warrantless trash searches of garbage left out for collection are not violative of the Fourth Amendment. (see *People vs. Huddleston* (1976) 38 Ill. App.3d 277, 347 N.E. 2d 76; *Smith vs. State* (1973 Alaska) 510 P.2d 793; *State vs. Fassler* (1972 Arizona) 503 P.2d 807; *Croker vs. State* (1970 Wyoming) 477 P.2d 122; *State vs. Purvis* (1968 Oregon) 438 P.2d 1002; *People vs. Whotte* (1982 Michigan) 317 N.W.2d 266; *State vs. Oquist* (1982

Minnesota) 327 N.W.2d 587; *State vs. Brown* (1984 Ohio) 484 N.E. 2d 215; *State vs. Stevens* (1985 Wis.) 367 N.W.2d 788; *State vs. Schultz* (1980 Fla.) 388 So.2d 1326.)

The California Court of Appeal found itself bound by the 4-3 decision by the California Supreme Court in *People vs. Krivda* (1971) 5 Cal.3d 357. There the Court held that a warrantless trash search violated defendants' reasonable expectation of privacy. In *Krivda* officers asked the refuse collectors to pick up trash barrels on the parkway in front of the residence, pour them into the empty well of the truck, and drive the trash down the street to the officers. The court found that the defendant had "expected privacy" because several cities have ordinances regulating trash pickup and an "additional element of expected privacy" which was violated because although the officers did not examine the contents until the trash had been placed in the well of the refuse truck, "at no time did defendants' trash lose its identity by being mixed and combined with the "conglomeration" of trash previously placed in the truck." (5 Cal.3d at 367.)

The dissent did not accept that the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor did it find "any constitutional compulsion for the newly developed doctrine of 'commingled trash'." (5 Cal.3d at 367-368, Wright., C.J., dissenting)

This Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, this Court vacated and remanded for clarification. (409 U.S. 33.)

The California Supreme Court, on remand, responded it had relied on both federal and independent state grounds. (*People vs. Krivda* (1973) 8 Cal.3d 623.)

But, as the California Court of Appeal noted, in the case at bar:

Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal. Const., art I, Section 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the Federal Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873) [App to Pet for Cert. 13]

Thus the independent state ground that insulated *Krivda* from review by this Court 15 years ago is gone.

As the dissent in *Krivda* noted, trash ordinances protect the exclusive right of a city or its agent to collect trash. (5 C3d at 368) The notion that such ordinances establish an expectation of privacy has been rejected. (*United States vs. Dzialak*, supra, 441 F.2d 212; *United States vs. Vahalik*, supra, 606 F.2d 99.)

"We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection because, "absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection."

. . .

The municipal ordinances cited by appellant does not alter the application of this rule in the instant case because there is no indication in the record that appel-

lant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. (*Vahalik*, supra, 606 F.2d at 101, cert.den. 444 US 1081)

The decision in *Krivda* creating a doctrine of commingled conglomerations is unworkable and not supported by the constitution. Under that theory the 'search' is lawful only if the police allow enough similar garbage to surround the suspect's so that nothing of evidentiary value can be found. Thus, there is no way the officer can, in advance, know if his search is allowed. If the suspect's garbage is in a white bag the police in California must apparently find some more white bags before they search. If they mark an 'X' on everyone else's bag perhaps some additional mixing would be required by the California court.

No doubt respondents, like most lawbreakers, hoped they wouldn't be caught but that hope has been transmuted by the California court into an enforceable duty of the trash collector or police to affirmatively assist them in disposing of evidence of their wrongdoing. Neither trash ordinances nor the 4th Amendment require this result. Respondents had no reason to suspect that the trash collector or the police would condone their illegal activity or cooperate in concealment of the contraband.

Of *Krivda*, it may truly be said:

One may seriously and fairly question the strength of a juridical light that is discerned by so few and invisible to so many. [*People vs. Disbrow* (1976) 16 Cal.3d 101, dissenting opinion of Justice Richardson at 129.]

CONCLUSION

For the foregoing reasons it is respectfully submitted the judgment of the California Court of Appeal, Fourth Appellate District should be reversed.

DATED: July 3, 1987

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